



REPUBLIC OF KENYA



**Wainaina t/a City Eye Advertising Agency v Safaricom Plc (Civil Suit E615 of 2021)  
[2025] KEHC 3975 (KLR) (Commercial and Tax) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3975 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E615 OF 2021  
BK NJOROGE, J  
MARCH 27, 2025**

**BETWEEN**

**ZAKAYO MUCHAI WAINAINA T/A CITY EYE ADVERTISING  
AGENCY ..... PLAINTIFF**

**AND**

**SAFARICOM PLC ..... DEFENDANT**

**RULING**

1. This Ruling is in respect of the Defendant's application by way of a Notice of Motion dated 27<sup>th</sup> September, 2024. It is supported by the affidavit of Esther Kinyenje Opiyo counsel for the Defendant/Applicant sworn on 27<sup>th</sup> September, 2024.
2. It is professed to be presented under the provisions of Section 1A, 1B, 3A of the Civil Procedure Act, Order 51 Rule 1 and 4 of the Civil Procedure Rules and all other enabling provisions of the law.
3. It seeks the following orders;
  1. That the Defendant be granted leave to amend its statement of defence filed herein on 24 March, 2021 as per the draft annexed to the affidavit in support of this application.
  2. That the costs of this application be in the cause.
4. The Applicant wishes to amend its defence to include an averment that it is the registered proprietor of trademark No. 65519 'SKIZA' (word and logo) in respect of goods and services in class 16, 18, 35 and 38 which mark was registered on 7<sup>th</sup> September, 2009.
5. That it is crucial that this fact be presented to this Court so that all the issues in dispute can be determined.



6. The application is opposed by the Plaintiff who has sworn a Replying Affidavit sworn on 14<sup>th</sup> October, 2024.
7. He avers that the amendment sought is misconceived. That it is sub-judice.
8. That there is a dispute before the Registrar of Trademarks arising out of the matter of an application to register trademark No. 10028 SKIZA ADTONE (word mark) in class 35 in the name of Safaricom Plc. That dispute involves the same parties herein and the Registrar of Trademarks is yet to make a decision.
9. The Plaintiff's fears are that if the amendment is allowed as prayed, his claim before the Registrar of Trade marks will be prejudiced.
10. Directions were granted that this matter do proceed by way of written submissions. The Court has seen and read the Defendant/Applicant's submissions dated 17<sup>th</sup> October, 2024 and the authorities cited. The Court has also read the Plaintiff's written submissions dated 14<sup>th</sup> October, 2024.
11. The question to be answered in this application is whether the amendments sought should be allowed.
12. The guiding principle to this Court is that amendments should be freely allowed, unless they take away an accrued right to a party, or are made upon passage of inexcusable delay such that limitation has set in, or they prejudice the opposing party. See *National Oil Corporation of Kenya Ltd -vs- Real Energy Limited (Civil Suit 144 of 2017)* [2022] KEHC 38 (KLR) (Commercial & Tax) 14 January, 2022 (Ruling).
13. The Court notes that the opposition to the amendment is that there is a pending dispute before the Registrar of Trade Marks. Without delving into the merits of the said dispute, the Defendant responds that the dispute before the Registrar of Trade marks relates to Trade Mark No. 100528 'SKIZA TONES' (word mark) while the amendment sought related to Trade Mark 65519 'SKIZA' (word and logo). These on the face of it appear to be two different marks.
14. The Court is inclined to allow the application for amendment. The amendment will only introduce an averment to the pleadings. The Defendant will still have to prove the averment before this Court, as per the rules and procedure.
15. The order of amendment will not interfere with the jurisdiction of the Registrar of Trade Marks to reach a decision, on any dispute pending before that Tribunal.
16. The Plaintiff will also be at liberty to file pleadings by way of a Reply to the Defence. The proposal that costs be in the cause is fair in the circumstances.

### **Determination**

17. The Defendant's application by way of a Notice of Motion dated 27<sup>th</sup> September, 2024 is allowed. The Defendant is to file and serve its Amended Statement of Defence within 14 days from the date of this order. Corresponding leave is also granted to the Plaintiff to file a Reply to Defence or an Amended Reply to Defence within 14 days from the date of being served with an Amended Statement of Defence.
18. It is for ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF MARCH, 2025**

**NJOROGE BENJAMIN K**

**JUDGE**

In the presence of;



Mr Zakato Muchai the Plaintiff in person

Mr Bett for the Defendant

Mr. Luyai – Court Assistant

